1130.

SUPREME COURT OF THE UNITED STATES.

No. 146.

ENOCH McCARTY, PLAINTIFF IN ERROR,

vs.

GUERNSEY Y. ROOTS, ERASTUS P. COE AND JOHN H. AYDELOTT.

IN ERROR TO THE CIRCUIT COURT U. S. FOR THE DISTRICT OF INDIANA.

INDEX.

	Original.	Print.
Declaration	1	1
Summons and return	4	3
Defendants' pleas	6	4
Replication to defendants' pleas	16	9
Demurrers to defendants' pleas	17	10
Joinder in demurrer	21	12
Demurrer to 6th plea withdrawn	22	12
Replication to 6th plea	22	12
Demurrer to replication to 6th plea	24	13
Joinder in demurrer	25	13
Amended 7th plea	25	14
Demurrer to 7th plea	26	14
Joinder in demurrer	26	15
Jury sworn	27	15
Judgment	28	15
Appeal prayed and allowed	28	15
Writ of error	28	16
Citation and service	30	16
Appeal bond	31	17
Clerk's certificate	32	17
Assignment of errors	32	18

GIDEON, print.

Pleas of the Circuit Court of the United States for the seventh judicial circuit and district of Indiana, begun, continued, and holden at Indianapolis, in said district, on the (17th) seventeenth day of November, in the year eighteen hundred and fifty-six. Present, the honorable Elisha M. Huntington, judge of said court.

GUERNSEY Y. ROOTS,
ERASTUS P. COE, and
JOHN H. AYDELOTT,
vs.
ENOCH MCCARTY. } Assumpsit.

Be it remembered, that heretofore, to wit, on the (25th) twenty-fifth day of June, in the year eighteen hundred and fifty-six, the plaintiffs, by counsel, file their certain declaration against the defendant, in the words and figures, to wit:

UNITED STATES OF AMERICA,
Indiana District.

In the Circuit Court of the United States for said district, Nov. term, 1856.

Guernsey Y. Roots, Erastus P. Coe, and John H. Aydelott, citizens of the State of Ohio, complain of Enoch McCarty, a citizen of the State of Indiana, of a plea of trespass on the case upon promises.

For that whereas Tyner & Childers, on the 16th day of October, A. D. 1854, at Peru, in the State of Indiana, *made* their bill of exchange in writing, and directed the same to one Richard Tyner, of New York, and thereby required the said Richard Tyner to pay to the said defendant, sixty days after the date thereof, at the office of Winslow, Lanier & Co., in the city of New York, in the State of New York, the sum of four thousand five hundred dollars, ($4,500); and the said Richard Ryner afterwards, to wit, on the day and year aforesaid, at New York aforesaid, upon sight thereof, accepted the said bill of exchange; and the said defendant afterwards, to wit, on the day and year aforesaid, at the district of Indiana, endorsed and assigned the said bill to one George Holland, who then and there endorsed and assigned the same to one Ezekiel Tyner, who then and there endorsed, and assigned, and delivered the same to the plaintiffs. And the said plaintiffs further say, that when the said bill of exchange became due and payable, to wit, on the 18th day of December, 1854, the same was presented and shown for payment at the said office of Winslow, Lanier & Co., in New York aforesaid, and payment of the said sum of $4,500 was then and

there duly demanded, to wit, at the district aforesaid; but that neither the said Richard Tyner, the defendant, nor any other person did or would pay the same, or any part thereof; whereupon the said bill of exchange was then and there duly protested for non-payment thereof, of all which the defendant then and there had due notice. By means whereof, the said defendant then and there became liable to pay to the said plaintiff the said $4,500, and 5 per centum damages thereon, with $5 00 costs of protest; and being so liable, he, the said defendant, in consideration thereof, undertook, and then and there faithfully promised the said plaintiffs, to pay them when requested.

And also, for that whereas the said Tyner & Childers, on the 16th of October, 1854, at Peru, in the State of Indiana, made their certain other bill of exchange in writing, and directed the same to Richard Tyner, of New York, and thereby required the said Richard Tyner to pay to the order of the defendant, sixty days after the date thereof, at the office of Winslow, Lanier & Co., in the city and State of New York, the sum of $4,500; and the said bill of exchange was by the said Richard Tyner, on the day and year aforesaid, at New York aforesaid, to wit, at the district aforesaid, accepted; and the said defendant afterwards, to wit, on the 16th of October aforesaid, at the district aforesaid, endorsed, assigned, and delivered the said bill of exchange to the plaintiffs.

And the said plaintiffs further say, that afterwards, when the said bill of exchange became due and payable according to the tenor and effect thereof, to wit, on the 18th day of December, 1854, the same was duly presented and shown for payment at the office of Winslow, Lanier & Co., in New York aforesaid, and payment of the said sum of $4,500 therein specified was then and there duly demanded; but that neither the said Richard Tyner, the said defendant, nor any one else did or would pay the same, or any part thereof; whereupon the said bill of exchange was then and there duly and legally protested for non-payment, of all which the defendant then and there had due notice.

By means whereof, the said defendant then and there became liable to pay to the said plaintiffs the said sum of money in the said bill mentioned, with 5 per centum damages thereon, and $5 00 costs of protest; and being so liable, he, the said defendant, afterwards, to wit, on the day and year aforesaid, at the district aforesaid, undertook, and then and there faithfully promised the said plaintiffs, to pay to them the same on request; yet the said defendants, though often requested so to do, have not paid the plaintiffs the several sums of money above mentioned, or either of them, or any part thereof; but so to do has hitherto failed and refused, and still does fail and refuse, to the damage of the plaintiffs of $10,000, and therefore they bring their suit, &c.

J. RYMAN, *Att'y for Pl'ffs.*

And thereupon, to wit, on the (25th) twenty-fifth day of June, in the year eighteen hundred and fifty-six, the following summons was issued by the clerk of said court:

The President of the United States of America to the marshal of the district of Indiana, greeting:

You are hereby commanded to summon Enoch McCarty, a citizen and resident of the State of Indiana, if he may be found in your district, to be and appear before the circuit court of the United States for the district of Indiana, to be holden before the judge thereof, at Indianapolis, in said district, on the third Monday in November next, to answer unto Guernsey Y. Roots, Erastus P. Coe, and John H. Aydelott, citizens of the State of Ohio, in a plea of assumpsit.

Damages ten thousand dollars, $10,000. And have you then and there this writ.

Witness, honorable Roger B. Taney, Chief Justice of the Supreme Court of the United States, and the seal of the circuit court of the United States for the district of Indiana hereunto affixed at Indianapolis, this 25th day of June, in the year of our Lord one thousand eight hundred and fifty-six.

[SEAL.]

H. BASSETT, *Clerk.*

Which summons was duly delivered to the marshal of said district, by him served, and returned with the following endorsement thereon, to wit:

Served this process on the within named Enoch McCarty on the 1st day of July, 1856; see his acknowledgment endorsed hereon of service.

JOHN L. ROBINSON,
U. S. Marshal.

And afterwards, to wit, at a circuit court of the United States, begun and holden at Indianapolis, in said district aforesaid, on the nineteenth day of November, in the year eighteen hundred and fifty-six. Present, the honorable Elisha M. Huntington, judge as aforesaid.

Come now the parties, by their attorneys, and the defendant files his plea in abatement, and the plaintiffs are ruled to reply, and day is given. And on the twenty-fourth day of the same month of November, that being the seventh judicial day of said November term for eighteen hundred and fifty-six,

Come now the plaintiffs, by their attorney, and file their demurrer to said plea in abatement, to which the defendant joins in demurrer, and day is given.

And afterwards, to wit, on the twenty-eighth day of November, that being the eleventh judicial day of the same term as aforesaid,

the parties come, and the defendant, upon leave, withdraws his joinder in demurrer and special plea, and now files his plea of the general issue to the declaration, and also files his seven special pleas to the action in these words, to wit:

General Issue.—First Plea.

Comes said defendant, and for plea says, that he did not promise and undertake in manner and form as plaintiffs have declared against him; and of this he puts himself upon the country.

SMITH & McCARTY,
Att'ys for Def't.

And the plaintiff likewise, &c.

Second Plea.

And for second plea, he says, that before the bringing of this suit, to wit, on the 21st day of December, 1854, at the State aforesaid, the said bill, and all moneys due thereby and thereon, was fully paid by R. Tyner, the acceptor thereof, to the branch of the State Bank of Indiana, at Richmond, she then and there being the holder and owner of the same, and that said plaintiffs received same after over-due and paid as aforesaid; and this defendant is ready to verify. Wherefore he prays judgment.

SMITH & McCARTY,
Att'ys for Defendant.

3d Plea.

And for third plea, said defendant says, that before the bringing of this suit, on the 21 day of December, 1854, at the State aforesaid, the said bills, and all moneys due thereon and thereby, were fully paid by George Holland, who was one of the endorsers and co-sureties thereof, to the Richmond branch of the State Bank of Indiana, she then and there being the holder and owner of the same, and that said plaintiffs received the same after it was due and so as aforesaid paid; and this the defendant is ready to verify. Wherefore he prays judgment.

SMITH & McCARTY,
Att'ys for Defendant.

4th Plea.

And for fourth plea, said defendant says, that before the bringing of this suit, to wit, on the 21st day of December, 1854, at the State aforesaid, he fully paid and satisfied said bills to the Richmond branch of the State Bank of Indiana, she then and there being the holder and owner of the same, and that said plaintiffs received same after it was over-due and so as aforesaid paid; and this the defendant is ready to verify. Wherefore he prays judgment.

SMITH & McCARTY,
Att'ys for Defendant.

5th Plea.

For fifth plea in this behalf said defendant says, that said bills in said suit mentioned were drawn, accepted, and endorsed in the State of Indiana for the benefit and accommodation of said Richard Tyner, and to enable him to borrow money thereon at the Richmond branch of the State Bank of Indiana, and so known to be by all parties thereto; and that each and all of the parties were then and there citizens and residents of said State of Indiana, and then and there known by each of said parties so to be, as also by said Richmond bank; that no consideration whatever passed to or from any of said parties, for or upon the drawing, accepting, or endorsing of said bills, until the same was discounted, when the amount of the same was paid to said Richard Tyner; that this defendant, said Holland, and said Ezekiel Tyner, were joint and co-sureties on said bills, when due were not paid by said R. Tyner. Defendant further avers, that after said bills were over-due, to wit, on the 21st day of December, 1854, at the State aforesaid, the said Richmond bank, then and there, and still being the holder and owner of said bills in suit, agreed to and with George Holland, one of the accommodation endorsers and co-sureties thereon, without the knowledge or consent of this defendant, that if he, the said Holland, would execute to and deliver his, said Holland's, notes to said bank for said moneys due, and payable on the first days of January, 1856, 1857 and 1858, secured by mortgage on real estate, she, the said bank, would give him extension and time of payment of said bills to the time aforesaid, which was then and there done by said Holland, and accepted by said bank, she still then and there being the holder and owner of said bills in suit, and without the consent of the defendant, whereby said defendant became and was discharged therefrom. And said defendant further avers, that after said bills came into the hands of said Holland as above stated, to wit, on the 1st day of July, 1855, at the State aforesaid, he, the said Holland, delivered said bills to said plaintiffs, as collateral security for a pre-existing debt of the said Richard Tyner, and for no other consideration whatever, the said bills at the time of said delivery being over-due and dishonored, and E. Tyner & Co.'s name still being thereon, as endorsed subsequent in its order to that of said George Holland on said bills. And said defendant further avers, that at the time of bringing of this suit, the said George Holland, nor any one in his behalf, had not paid said moneys to said Richmond bank named above, nor any part thereof, or any other person entitled to receive the same; and this said defendant is ready to verify. Wherefore he prays judgment.

SMITH & McCARTY,
Att'ys for Defendant.

6th Plea.

And the said defendant for sixth plea in this behalf says, that said bills were made, drawn, accepted and endorsed for the accommodation of said Richard Tyner; that the said Holland, Ezekiel Tyner, & Co., and this defendant were joint and co-sureties thereon for said Tyner; that no consideration whatever passed between or to or from said drawer, acceptor or endorsers thereon, for said bills, but the same remained in the hands of said R. Tyner until negotiated by him in the Richmond branch of the State Bank of Indiana, for his benefit; that afterwards and before said bills became due, to wit, on the 1st day of October, 1854, the said R. Tyner, the said Tyner & Childers, and the said E. Tyner & Co., failed, and each made a general assignment of their property, rights, credits and effects to the said Holland, Abner McCarty and Richard H. Tyner; that said Holland accepted said trust and the property, rights, credits and effects so assigned, and became the active trustee in the execution of the same; that said assignments were made for the payment of debts and liabilities, first to indemnify and save harmless Abner McCarty, second to indemnify and save harmless the defendant, said Holland, said plaintiffs, and N. D. Gallion, in proportion to their respective liabilities, and next for the payment of other debts and other trusts; and said defendant avers, that said property so assigned was of the value of one hundred and fifty thousand dollars, and amply sufficient*ly* to pay the bills now in suit, in the due administration of the same; that said Holland, after the acceptance of said trust, and while he still held the same and the said effects, to wit, on the first day of July, 1855, delivered said bills endorsed in blank, with E. Tyner & Co.'s name thereon in blank, to said plaintiffs, as collateral security for a pre-existing debt of said Richard Tyner to said plaintiffs; and defendant further avers, that said plaintiffs, at the time of taking the same, knew all of the facts hereinbefore stated; and defendant further avers, that said E. Tyner & Co.'s name is subsequent in its order on said bills to that of said Holland; and this the defendant is ready to verify. Wherefore he prays judgment.

SMITH & McCARTY,
Atty's for Defendant.

7th Plea.

And for seventh plea, said defendant says, that he never endorsed but one bill of the date, tenor and amount described in said declaration of plaintiffs; that the same was endorsed by this defendant, George Holland and E. Tyner & Co., as accommodation endorsers, in blank, and that this defendant never received any consideration whatever for his said endorsement of George Holland, E. Tyner & Co., or said plaintiffs therefor, or of any other person.

Defendant further avers, that he never did assign or deliver said bill to said plaintiffs directly, nor did the said Ezekiel Tyner & Co., as this defendant believes, but that said bill, so endorsed in blank, was, after the same was over-due and dishonored, was delivered, still being so endorsed in blank, by this defendant, said Holland and E. Tyner & Co., by George Holland, one of said endorsers, to said plaintiffs, as collateral security for a pre-existing debt of said R. Tyner, without any other consideration; and this he is ready to verify. Wherefore he prays judgment.

McCARTY, HOLLAND & SMITH,
Att'ys for Def't.

8th Plea.

Comes the said defendant and says, that the said bills of exchange in said first and second counts of plaintiffs' declaration mentioned are one and the same identical bill, and not other or different; that said defendant never endorsed but one bill of the amount and date in said declaration stated. He further says, that the said firm of Tyner & Childers consisted of Richard Tyner, James N. Tyner and William Childers; and that of E. Tyner & Co., of Richard Tyner and Ezekiel Tyner; that said Richard Tyner drew said bill in the name of Tyner & Childers, and accepted the same in his own name, and endorsed the same in the name of E. Tyner & Co.; that each of the parties, with the said George Holland and this defendant, were, at the times of the drawing, accepting and endorsing said bill, citizens and residents of the State of Indiana, and that said bills were drawn, accepted, and endorsed by each of said several parties as such, in the State of Indiana; and that the said Holland, this defendant, and the said Ezekiel Tyner, have ever since continued to be citizens and residents of the State of Indiana; that said bill of exchange in said declaration mentioned was gotten up for the accommodation of said Richard Tyner and firm of Tyner & Childers, and known so to be by the drawers, acceptors and endorsers aforesaid, to be discounted at the branch of the State Bank of Indiana, at Richmond; that said bill was left in the hands of the said Richard Tyner, so drawn, accepted and endorsed by the said defendant, said George Holland and E. Tyner & Co., the said bill so discounted by the said bank, and proceeds thereof, paid to the said Richard Tyner; that said endorsers were co-sureties thereon, and understood by each, the said defendant, the said George Holland and the said Ezekiel Tyner, each to be co-sureties and liable to pay each a pro rata share of said bill, and each of said parties have, since the endorsing of said bill, admitted a liability with the others in case of insolvency of prior parties, for whose benefit said bill was so made, to contribute towards payment. And said defendant further says that, before said bill became due and payable, the said Tyner & Childers, the said R. Tyner and the

said E. Tyner & Co., failed, and each of said firms made a general assignment of lands, goods, property, rights, credits and effects, upon trust to pay debts, the said Tyner & Childers, of property and effects of the value of from $1,000 to $5,000, to one H. J. Shirk: First, to payment of depositors' 2 debts, for which A. McCarty and the said George Holland was liable; and also for the payment of debts to plaintiff and liabilities to them, the said R. Tyner assigned property and effects amounting in value to between $60,000 and $150,000, to said George Holland, Abner McCarty and Richard Tyner, in trust, first, to indemnify and save harmless Abner McCarty; and, second, this defendant and George Holland, and said plaintiffs and N. D. Gallion, in proportion to their respective liabilities for him, and then for payment of other debts upon other trusts; that said Holland accepted said trust and property, and became active in its execution; that, after accepting said trust as aforesaid by the said Holland, he proceeded to the sale and disposition of said trust-property, and took up of the Richmond Bank, she then being the holder of the same, the said bill in said declaration mentioned, after the same was due, and dishonored and protested, not by the payment of the same in money, but by new notes of him, the said Holland, for this and other debts of the said Tyner, Holland and others, amounting to over $20,000; which said sum, in notes of different amounts, were payable on the 1st days of January, of the years 1856, 1857 and 1858, with interest from date, and dated December 21, 1854, and secured by mortgage on real estate, conveyed by said Holland to said bank, and said last notes were delivered; and which said novation of said debts and extension of the time of payment of the money in said bill mentioned, by and between the said bank, as the holder of the same, and the said Holland, was done without the knowledge or consent of the defendant, the said bank then and there knowing of said assignment to said Holland, and that said bill was for the accommodation of said R. Tyner, and of the acceptance of said trust-property by said Holland, and that all of said assignors were cosureties, and liable to equal contribution upon the payment of the bill. And the defendant further says, that the said Holland, still being one of the trustees of said R. Tyner, and having property in his hands of said Tyner's upon the trust aforesaid, of greater value than the amount of the bill in said declaration mentioned, afterwards, to wit, on the 1st day of July, 1855, at the county aforesaid, in violation of his trust and duty, delivered said bill to said plaintiffs, as collateral security for a pre-existing debt of the said R. Tyner, on which the said Holland was endorser, the said Holland then and there and still being a citizen of the State of Indiana. And defendant further says, that the said last notes, so made and delivered to the Richmond Bank as aforesaid, in part, for the moneys in said bill of exchange mentioned, *has* not yet been paid

by the said Holland, or any one on his behalf, except as to the first instalment. And defendant further avers, that at the time said bill was so as aforesaid delivered to said plaintiffs by said Holland, said plaintiffs knew that the said Richard Tyner had made the assignment aforesaid to said Holland and others, of property of great value, and that said Holland was one of the said assignees of the same, and had accepted said trust and assigned property. All of which the defendant is ready to verify. Wherefore he prays judgment.

SMITH & McCARTY,
Att'ys for Defendants.

And afterwards, to wit, on the (2d) second day of December, in the year eighteen hundred and fifty-six, that being the fourteenth judicial day of the term aforesaid of the court aforesaid, come now the parties, and the plaintiffs file their replication to the second and fourth pleas, and file their demurrer to the third, fifth, sixth, seventh, and eighth pleas, in these words and figures, to wit:

Replication to 2d Plea.

And the said plaintiffs, as to the said plea of the said defendant by him secondly above pleaded, says, that he ought not to be barred or precluded from having and maintaining their said action against the said defendant by reason of anything therein contained, because they say that the said Richard Tyner did not pay to the said branch of the State Bank at *the* Richmond the said sum of money specified in the said bills of exchange, in the said declaration mentioned, or either of them, or any part thereof, and this the plaintiffs pray may be inquired of by the country.

JOHN RYMAN,
Att'y for Plaintiffs.

And the defendant does the like.

Replication to 4th Plea.

And as to the said plea of the said defendant by him fourthly above pleaded, the said plaintiffs say, precludi non, because they say that the said defendant did not pay the said sum of money specified in the said bills of exchange, or in either of them, or any part thereof, to the said Richmond branch of the State Bank of Indiana, in manner and form as the said defendant has in said fourth plea above stated, and this the plaintiffs pray may be inquired of by the country.

JOHN RYMAN,
Att'y for the Plaintiffs.

And the defendant doth the like.

Demurrer to Third Plea.

And to the said plea of the said defendant, thirdly by him above pleaded, the said plaintiffs say, precludi non, because they say that the said third plea, and the matters and things therein contained, in manner and form as the same are therein above pleaded and set forth, are not sufficient in law to bar or preclude the said plaintiffs from having and maintaining their said action against the said defendant, and this they are ready to verify; wherefore they pray judgment.

JOHN RYMAN,
Att'y for Plaintiffs.

Demurrer to 5th Plea.

And as to the said plea of the said defendant by him fifthly above pleaded, the said plaintiffs say, precludi non, because they say that the same, and the matters and things therein contained, in manner and form as the same are therein above pleaded and set forth, are not sufficient in law to bar or preclude the said plaintiffs from having and maintaining their said action against the said defendant, and this they, the said plaintiffs, are ready to verify; wherefore they pray judgment. And for special cause of demurrer the said plaintiffs set down and show to the court the following: 1st, it is not stated in said plea that there was any agreement or understanding between the drawers and endorsers of the said bills of exchange, or any of them, that they were to contribute equally in the paying and satisfying of the said bills of exchange, in the event of the failure of the said R. Tyner to pay the same, but leaves it to be inferred from the allegation that they were joint and co-sureties for him on accommodation bills of exchange; 2d, said plea is in other respects informal and uncertain.

JOHN RYMAN,
Att'y for Plaintiffs.

Demurrer to 6th Plea.

And as to the said plea of the said defendant by him sixthly above pleaded, the said plaintiffs say, precludi non, because they say that the same and the matters and things therein contained, in manner and form as the same are therein above pleaded and set forth, are not sufficient in law to bar or preclude the said plaintiffs from having and maintaining their said action against the said defendant, and this they are ready to verify; wherefore they pray judgment.

And for special cause of demurrer, the said plaintiffs set down and show to the court the following: 1. It is not averred in the said plea that there was any agreement or understanding between the said Holland, E. Tyner & Co., and the said defendant, that in the event of the failure of the said Richard Tyner to pay the said

1136

bills of exchange, that the same should be paid by the said Holland, E. Tyner & Co., and the said defendant, jointly or in equal proportions, but leaves it to be inferred that there was such an agreement or understanding from the allegation that they were joint and cosureties of the said Richard Tyner on said bills; 2d, the said sixth plea is in other respects informal and uncertain.

JOHN RYMAN,
Att'y for Plaintiffs.

Demurrer to 7th Plea.

And as to the said plea of the said defendant, seventhly by him above pleaded, the said plaintiffs say, precludi non, because they say that the same and the matters and things therein contained, in manner and form as the same are therein above pleaded and set forth, are not sufficient in law to bar or preclude the said plaintiffs from having or maintaining their said action against the said defendant, and this they are ready to verify; wherefore they pray judgment.

JOHN RYMAN,
Att'y for Plaintiffs.

Demurrer to 8th Plea.

And the said plaintiff, as to the said plea of said defendant by him eighthly above pleaded, says that the same and the matters and things therein contained, in manner and form as the same are therein above pleaded and set forth, are not sufficient in law to bar or preclude the said plaintiffs from having and maintaining their said action against the said defendant, and this they, the said plaintiffs, are ready to verify, and for cause of demurrer the said plaintiffs set down and show to the court the following: 1st, the said eighth plea as to one of the counts in the said declaration amounts to the general issue; 2d, the said plea is so untechnically and inartificially drawn that it is impossible for the plaintiffs to take issue thereon; 3d, all that part or portion of said plea which relates to the manner in which the said George Holland paid off and satisfied the said bill of exchange, is surplusage and irrelevant matter; 4th, all that portion of the said plea which relates to the assignments made to the said R. Tyner, Tyner & Childers, and E. Tyner & Co., is also surplusage and irrelevant to the matter in controversy in this suit; 5th, the said plea, instead of stating that there was an agreement between the said defendant, George Holland, and E. Tyner & Co., to each pay a pro rata share of said bill in the event of the insolvency of prior parties, sets forth the circumstances or evidence tending to prove that fact; 6th, said plea is uncertain in this, that it does not set forth or profess to set forth the tenor or effect of the assignments made by R. Tyner, Tyner & Childers,

and E. Tyner & Co., or the value of the property assigned, with proper certainty; 7th, said plea is an argumentative denial of the plaintiffs' cause of action, and is in other respects uncertain, informal and defective.

JOHN RYMAN,
Att'y for Plaintiffs.

And afterwards, to wit, on the day and year last aforesaid, at the term of the court aforesaid, the said defendant, by his counsel, now files his joinders in demurrer, in these words, to wit:

Joinder and Demurrer.

And the said defendant says, that the said several third, fifth, sixth, seventh, and eighth pleas, by him above pleaded, to which said plaintiffs have demurred in law, are severally good and sufficient in law to bar said action, and this he is ready to verify; wherefore he prays judgment.

SMITH & McCARTY,
Att'ys for Defendant.

And afterwards, to wit, on the thirty-third judicial day of the term aforesaid, of the court aforesaid, the parties, by their counsel, come, and the court being sufficiently advised, sustained the demurrer to the third, fifth, seventh, and eighth pleas, and overrule the demurrer to the sixth plea; and thereupon the plaintiffs ask and obtain leave to withdraw their demurrer to said sixth plea, and reply to the same; and the defendant now asks and obtains leave to withdraw his joinder to the demurrer of the plaintiffs to the seventh plea, and to amend said seventh plea; and thereupon the plaintiffs file their replication to the sixth plea, to which the defendant files his demurrer; and the defendant also files his amended seventh plea.

Replication to 6th Plea.

And the said plaintiffs, as to the said plea of the said defendant by him sixthly above pleaded, say, that they ought not to be barred or precluded from having or maintaining the said action against the said defendant, by reason of anything in said sixth plea above contained; because, they say, that the said Tyner & Childers and E. Tyner & Co. did not each, nor either of them, make an assignment of their property, rights, credits, or effects to the said Holland, Abner McCarty, and Richard H. Tyner, as stated in the said sixth plea of the defendant; but it is true that the said Richard Tyner, on the (10th) tenth day of November, 1854, made an assignment of said property, rights, credits, and effects to the said Holland, Abner McCarty, and Richard H. Tyner, in trust: First, to indemnify and save harmless the said Abner McCarty, as a creditor and surety of the said Richard Tyner; 2d, to indemnify and save

harmless the said Holland, the said N. D. Gallion, Ezekiel Tyner, and the said plaintiffs, as creditors and sureties of the said R. Tyner; nevertheless, the said plaintiffs say, that the property, rights, credits, and effects so assigned to the said Holland, Abner McCarty, and Richard H. Tyner, as aforesaid, was and still is wholly inadequate and insufficient in value to indemnify and save harmless the said Abner McCarty, as such creditor and surety of the said R. Tyner; so that there is not now, nor has there ever been, any effects or moneys of the said R. Tyner, or any other person or persons, in the hands or possession of the said Holland, or under his control, wherewith he might, or ought to have paid, or satisfied the said sum of money in the said bills of exchange above mentioned, or any part thereof.

And this they, the said plaintiffs, pray may be inquired of by the country.

JOHN RYMAN,
Att'y for Plaintiffs.

Demurrer to Replication to 6th Plea.

And the said defendant, as to said replication of the said plaintiffs to said sixth plea, says, that said replication is insufficient in law, in manner and form as the same is pleaded, to entitle said plaintiffs to have and maintain said action, and this he is ready to verify; wherefore he prays judgment.

And for cause of demurrer, the defendant shows to the court here the following: First, said replication assumes to answer the whole plea, and is only an answer to part of the plea; second, said replication neither confesses and avoids, nor denies the whole matters of defence set up in the plea, but leaves material allegations and facts in the plea wholly unanswered; third, the replication does not answer or deny the co-suretyship of said Holland and the defendant, nor does it confess and avoid the same; fourth, said replication does not deny or confess and avoid the extension of time alleged in the plea given by said holder for the payment of the bills; and said replication is otherwise insufficient in law.

SMITH, HOWLAND & McCARTY,
Att'ys for Defendant.

And afterwards, to wit, on the thirty-third judicial day of the term aforesaid, of the court aforesaid, come the parties, and the plaintiffs now file their joinder to the demurrer to said replication, in these words, to wit:

Joinder in Demurrer.

And the said plaintiffs say, that their said replication to the said sixth plea of the said defendant is good and sufficient in law for the

said plaintiffs to have and maintain their said action against the said defendant, and this the said plaintiffs are ready to verify; wherefore they pray judgment.

JOHN RYMAN,
Att'y for Plaintiffs.

And afterwards, to wit, on the thirty-third judicial day of the term aforesaid, of the court aforesaid, come the parties, and the defendant now files his seventh plea as amended, in these words, to wit:

7th Plea as Amended.

And for seventh plea the said defendant says, that this defendant and George Holland became at the time of the endorsement of the bills in said suit, and were co-sureties for Richard Tyner, the acceptor, for whose accommodation said bills were negotiated for said R. Tyner, at the Richmond branch of the State Bank of Indiana, and that after said bills became due, to wit, on the 21st day of December, 1854, at the State aforesaid, it was agreed by and between the said bank and said Holland, said bank still being the holder and owner of said bills, that if the said Holland would give his notes to said bank, bearing six per cent. interest, with real and personal security, due and payable, by instalments, on the first days of January, 1856, 1857, and 1858, she, the said bank, would extend the day and time of said payment of said bills to the times aforesaid, which was then and there done by said Holland and accepted by said bank, she still being the holder of said bills in suit, all of which was done without the knowledge or consent of the defendant; and that said bills were, after due, delivered to said plaintiffs by said Holland, as collateral security, for a pre-existing liability of said Holland, and for no other consideration, and in no other manner, and this the defendant is ready to verify; wherefore they pray judgment.

SMITH & McCARTY,
Atty's for Defendant.

And afterwards, to wit, on the day and year aforesaid, of the term of the court aforesaid, come the parties, and the plaintiffs file their demurrer to said seventh plea as amended, to which the said defendant files his joinder in demurrer, in these words, to wit:

Demurrer to 7th Plea.

And the plaintiffs say, that said amended seventh plea is insufficient in law to bar said action, and this they are ready to verify; wherefore they pray judgment.

JOHN RYMAN,
Att'y for Plaintiffs.

Joinder in Demurrer.

And the defendant says, that said seventh plea as amended is good and sufficient in law for him to bar said action, and this he is ready to verify; wherefore he prays judgment.

SMITH & McCARTY,
Atty's for Defendant.

And afterwards, to wit, on the fourteenth day of January, in the year eighteen hundred and fifty-seven, that being the forty-first judicial day of said term of said court, the parties, by counsel, come, and the court being sufficiently advised, sustain the demurrer to the said seventh plea as amended, and overrule the demurrer to the replication of the plaintiffs to the said sixth plea; whereupon the defendant now withdraws and strikes out his said first, second, and fourth pleas, upon which issues in fact have been joined to the country, leaving only on file said third, fifth, sixth, seventh, and eighth pleas, to which said demurrers have been sustained by the court, and abides by said pleas as good and sufficient in law to bar said action; and the court being of opinion that said pleas are insufficient in law, and that said replication to the sixth plea is good and sufficient, consider that said plaintiffs recover their damages by reason of the premises in the declaration mentioned; but because those damages are uncertain, let a jury come to inquire of the same, and thereupon come a jury, to wit: [1]Nathan B. Palmer, [2]William Campbell, [3]John Hendricks, [4]Aaron Wright, [5]Christopher Werbe, [6]Henry Nelson, [7]Joseph K. Wemscott, Nehemiah Hayden, Robert A. Taylor, [10]Douglass Maguire, [11]Canada Cowen, and Robert Greenfield, twelve good and lawful men, who being sworn well and truly to assess the damages of the plaintiffs, return into court the following verdict, to wit: "We, the jury, assess the plaintiffs' damages at fifty-two hundred and eighty-four dollars and fifty cents."

It is therefore, by the court, considered that the plaintiffs recover against the defendant the sum of five thousand two hundred and eighty-four dollars and fifty cents in damages, as by the jury aforesaid assessed, besides their costs and charges in this behalf, taxed at dollars and cents.

And thereupon the defendant prays an appeal to the Supreme Court of the United States, which is granted upon his filing bond with a penalty of double the amount of the judgment, and with William M. McCarty as security, who is approved by the court; and thereupon the defendant files his writ of error, and citation, and bond, in these words, to wit:

Writ of Error.

The President of the United States of America to the judges of the Circuit Court of the United States, for the seventh circuit and district of Indiana.

Because in the record and proceedings, and also in the rendition of the judgment in the said seventh circuit and district of Indiana, wherein Guernsey Y. Roots, Erastus P. Coe, and John H. Aydelott are plaintiffs, and Enoch McCarty is defendant, manifest errors have intervened to the great damage of the said Enoch McCarty, as by his complaint appears, and being willing that the errors, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington city on the first Monday in December next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct the error, what in right and according to law and custom of the United States should be done.

Witness, Roger B. Taney, Chief Justice of the Supreme Court of the United States, this 14th day of January, 1857, at Indianapolis.

In testimony whereof, I, Horace Bassett, clerk of said circuit court of the United States, have hereunto set my hand [SEAL.] and affixed the seal of said court, at Indianapolis, the day and year aforesaid.

HORACE BASSETT, *Clerk.*

Citation.

UNITED STATES OF AMERICA.

To Guernsey Y. Roots, Erastus P. Coe, and John H. Aydelott.

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December, 1857 next, in pursuance to a writ of error filed in the clerk's office of the circuit court of the United States for the seventh circuit and district of Indiana, wherein Enoch McCarty is plaintiff and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and reversed, and speedy justice done to the parties in this behalf.

Witness, Hon. Elisha M. Huntington, district judge of the United States for the district of Indiana, this 14th day of January, A. D. 1857.

E. M. HUNTINGTON.

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Acknowledgment of Service.

I, John Ryman, attorney for said defendants in error, acknowledge the service of the above citation, and waive the service by an officer.

J. RYMAN, *for Appellees.*
(*Of Lawrenceburgh, Indiana.*)

14th day of January term, 1857.

Bond.

Know all men by these presents, that we, Enoch McCarty and William M. McCarty, are held and firmly bound unto Guernsey Y. Roots, Erastus P. Coe, and John H. Aydelott, in the penal sum of ten thousand five hundred and sixty-nine dollars, to the payment whereof, well and truly to be made, I bind myself and heirs firmly by these presents.

The condition of the above obligation is such, that whereas Enoch McCarty has appealed from the judgment of the circuit court of the United States for the district of Indiana, to the Supreme Court of the United States in a cause therein pending, wherein the said Roots, Coe, and Aydelott were plaintiffs, and the said Enoch McCarty was defendant: Now, should the said Enoch McCarty well and truly prosecute said appeal and pay the condemnation money, including said judgment, that may be adjudged against him in the Supreme Court of the United States, then the above obligation to be void, else to be and remain in force.

ENOCH McCARTY, [SEAL.]
W. M. McCARTY. [SEAL.]

INDIANA DISTRICT, *ss.*

I, Horace Bassett, clerk of the United States circuit court for the seventh judicial circuit and district of Indiana, do certify the within and foregoing to be a full and complete transcript from the records now in my office, in the above entitled case, and cost of this record, $9 70, paid by O. H. Smith.

In testimony whereof, I have hereto set my hand and affixed the [SEAL.] seal of said court, at Indianapolis, this 5th day of February, eighteen hundred and fifty-seven.

H. BASSETT, *Clerk.*

In the Supreme Court of the United States of the December term, A. D. 1857.

ENOCH M. McCARTY
vs.
GUERNSEY Y. ROOTS, Erastus P. Coe, and John H. Aydelott.

And now at this day, to wit, on the first judicial day of the Supreme Court of the United States of the December term, A. D. 1857,